

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8**

Docket No. **CWA-08-2003-0099**

In the Matter of:)	
)	
Action Carrier,)	PENALTY COMPLAINT AND NOTICE OF OPPORTUNITY FOR HEARING
a/k/a Cy and Mike's)	
3902 North National Ave.)	
Sioux Falls, SD 57104)	
)	
Respondent.)	

JURISDICTION

1. This civil administrative enforcement action is authorized by Congress in section 311(b)(6) of the Federal Water Pollution Control Act (known as the Clean Water Act ("CWA")), 33 U.S.C. §1321(b)(6)(B)(i). EPA regulations authorized by the statute are set out in part 112 of title 40 of the Code of Federal Regulations, and violations of the regulations constitute violations of the statute section 311(j)(1)(C) of the Act, 33 U.S.C. § 1321(j)(1)(C), as amended by the Oil Pollution Act Amendments of 1990, 33 U.S.C. § 2701 et seq. The rules for this proceeding are the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders and the Revocation, Termination or Suspension of Permits ("Rules of Practice")," 40 CFR part 22, a copy of which is enclosed, as adjusted by subpart I of the rules, which provides Respondent a less complicated administrative hearing process.

2. The undersigned EPA officials have been properly delegated the authority to issue this action.

3. EPA alleges that Respondent has violated the CWA, section 311(b)(6)(A), 33 U.S.C. § 1321(b)(6)(A) and the regulations at 40 CFR part 112 setting forth the requirements for preparation and implementation of Spill Prevention Control and Countermeasure (SPCC) Plans, and proposes the assessment of a civil penalty as more fully explained below.

NOTICE OF OPPORTUNITY FOR A HEARING

4. Respondent has the right to a public hearing before a regional judicial officer to disagree with (1) any fact alleged by EPA in the Complaint, or (2) the appropriateness of the proposed penalty.

5. To disagree with the Complaint, and assert your right to a hearing, Respondent must file a written answer (and one copy) with the Regional Hearing Clerk , 999 18th Street, Suite 300, Denver, CO, 80202-2466, within 30 days of receiving this Complaint. The answer must clearly admit, deny or explain the factual allegations of the complaint, the grounds for any defense, the facts you may dispute, and your specific request for a public hearing. Please see section 22.15 of the Rules of Practice for a complete description of what must be in your answer. **FAILURE TO FILE AN ANSWER AND REQUEST FOR HEARING WITHIN 30 DAYS MAY WAIVE RESPONDENT'S RIGHT TO DISAGREE WITH THE ALLEGATIONS OR PROPOSED PENALTY, AND RESULT IN A DEFAULT JUDGMENT AND ASSESSMENT OF THE PENALTY PROPOSED IN THE COMPLAINT.**

QUICK RESOLUTION

6. If Respondent does not contest the findings and penalty proposal set out below, this action may be resolved by paying the proposed penalty in full pursuant to 40 CFR § 22.18. If such payment is made within 30 calendar days of receipt of this Complaint, no answer need be filed. For more time for payment, Respondent may file a statement agreeing to pay the penalty within 30 days of receipt of the Complaint, then pay the money within 60 days of such receipt. Payment is to be made by sending a cashier's or certified check **payable to "Oil Spill Liability Trust Fund,"** with the docket number and name of the facility written on the check, to:

Jane Nakad (8ENF-T)
Technical Enforcement Program (8ENF-T)
U.S. EPA Region 8
999 18th Street, Suite 300
Denver, CO 80202-2466

Payment of the penalty in this manner does not relieve Respondent of its obligation to comply with the requirements of the statute and regulations. Payment of the penalty in this manner shall constitute consent by Respondent to the assessment of the proposed penalty and a waiver of Respondent's right to a hearing on this matter.

SETTLEMENT NEGOTIATIONS

7. EPA encourages discussing whether cases can be settled through informal settlement conferences. If you want to pursue the possibility of settling this matter, or have any other questions, contact Brenda L. Morris at 1-800- 227-9441, extension 6891, or the address below. **Please note that calling the attorney or requesting a settlement conference does NOT delay the running of the 30 day period for filing an answer and requesting a hearing.**

GENERAL ALLEGATIONS

The following general allegations apply to each count of this Complaint:

8. Respondent is a corporation organized under the laws of South Dakota, and therefore, a "person" within the meaning of the CWA, section 311(a)(7), 33 U.S.C. §1321(a)(7).

9. The Respondent owns and operates a bulk fuel storage facility known as Cy and Mike's Highway Service, Inc. or Cy and Mike's, located at 1011 4th Avenue, Watertown, South Dakota ("facility").

10. In August, 2003, Cy and Mike's Highway Service, Inc. merged with Respondent, Action Carrier.

11. Respondent is now, and Cy and Mike's Highway Service, Inc. was at the time of the inspection, an "owner and operator" of an "onshore facility" as those terms are defined in the CWA, sections 311(a)(6) and (10), respectfully, 33 U.S.C. §§1321(a)(6) and (10).

12. An authorized EPA inspector entered the facility with the consent of Respondent on September 19, 2001, to inspect it for compliance with the statute and regulations.

13. The statute requires any person who owns or operates a bulk fuel storage facility to comply with the regulations at 40 CFR §112.7(e) as required by 40 CFR §112.3(a) setting forth the requirements for preparation and implementation of SPCC Plans.

COUNT 1

14. EPA determined that Respondent failed to prepare a written SPCC Plan for the facility in accordance with the regulations at 40 CFR §112.7(e) and required by 40 CFR §112.3(a).

15. Respondent's failure to comply with regulations at 40 CFR part 112 setting forth the requirements for preparation of SPCC plans constitutes one violation of the regulations and therefore one violation of the CWA section 311(b)(6)(A), 33 U.S.C. § 1321(b)(6)(A) and section 311(j)(1)(C), 33 U.S.C. § 1321(j)(1)(C).

COUNT 2

16. At the time of the inspection, the following SPCC measures were found to be deficient:

- a. no cap controlling drainage from the secondary containment;
- b. no drainage controls for areas that were not diked;
- c. no records of storm water drainage events;

- d. no periodic integrity testing of bulk storage tanks;
- e. no testing of level sensing devices on bulk tanks;
- f. no secondary containment of mobile or portable tanks;
- g. no regular testing or inspecting of aboveground pipes and valves;
- h. no secondary containment for loading/unloading areas;
- i. No warning or barrier system to prevent trucks from moving during loading/unloading;
- j. no written procedures or records of equipment inspections; and
- k. no SPCC training of facility personnel.

17. EPA determined that Respondent failed to implement numerous SPCC measures.

18. Respondent's failure to comply with regulations at 40 CFR part 112 setting forth the requirements for implementation of SPCC plans constitutes one violation of the regulations and therefore one violation of the CWA § 311(b)(6)(A), 33 U.S.C. § 1321(b)(6)(A) and section 311(j)(1)(C), 33 U.S.C. § 1321(j)(1)(C).

PROPOSED CIVIL PENALTY

19. The CWA, section 311(b)(6)(B)(i), authorizes the assessment of a civil penalty of up to \$11,000 for each violation, except that the maximum amount of any class I civil penalty shall not exceed \$27,500. The CWA, section 311(b)(8), 33 U.S.C. §1321(b)(8), requires EPA to take into account the following factors in assessing a civil penalty: the seriousness of the violation, the economic benefit to the violator, if any, resulting from the violation, the degree of culpability involved, any other penalty for the same incident, any history of prior violations, the nature, extent, and degree of success of any efforts of the violator to minimize or mitigate the effects of the discharge, the economic impact of the penalty on the violator, and any other matters as justice may require.

20. Specifically, the proposed penalty is based on the following:

- a. The Respondent failed to have a SPCC plan;
- b. the Respondent had a storage capacity of approximately 34,000 gallons of fuel at its facility;
- c. the inspection revealed Respondent's failure to implement eleven SPCC measures, including no secondary containment of mobile tanks or the unloading and loading areas and no cap for the secondary containment of the bulk tanks, which would have a significant impact on the Respondent's ability to respond to a worst case spill scenario;
- d. the duration of time that has passed since the inspection is two years and Respondent remains in noncompliance;
- e. the potential for environmental impact from a discharge is moderate to major in that the Big Sioux River is approximately 1/3 mile east by way of the municipal storm water drainage system and drains into a lake which is a drinking water supply; and

f. the Respondent's culpability is deemed to be major in that the Complainant has yet to receive a draft SPCC Plan, and since February, 2003, Complainant and Respondent have had discussions regarding an explanation of the history and current status of the regulations, the nature of the Respondent's specific violations, the necessary corrective measures, and the calculation of the penalty and the factors that increase and decrease the proposed penalty amount.

21. In light of the statutory factors and the specific facts of this case, EPA proposes that a penalty of \$12,500 be assessed against Respondent for the violations alleged above.

22. The Regional Judicial Officer is not bound by EPA's penalty policy or the penalty proposed by Complainant, and may assess a penalty above the proposed amount, up to \$27,500, the maximum amount authorized in the statute.

To discuss settlement, or ask any questions you may have about this process, please contact Brenda L. Morris, Enforcement Attorney, at 1-800- 227-9441, extension 6891, or the address below.

United States Environmental Protection Agency
Region 8, Office of Enforcement, Compliance and
Environmental Justice, Complainant
999 18th Street, Suite 300 (ENF-L)
Denver, CO 80202

Date: 9/26/03 By: Timothy Osag for/
Elisabeth Evans, Director
Technical Enforcement Program

Date: 9/24/03 By: SIGNED
David J. Janik, Supervisory Enforcement Attorney
Legal Enforcement Program

Date: 9/26/03 By: SIGNED
Brenda L. Morris, Attorney
Legal Enforcement Program

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Docket No.: **CWA-08-2003-0099**

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the original and one copy of the COMPLAINT AND NOTICE OF OPPORTUNITY FOR HEARING was hand-carried to the Regional Hearing Clerk, EPA Region 8, 999 18th Street, Suite 300, Denver, Colorado, and that a true copy of the same was sent via certified mail to:

Mr. Michael Walsh, Registered Agent for
Action Carrier
3902 North National Ave.
Sioux Falls, SD 57104

and

Mrs. Wendy Walsh
Cy and Mike's Highway Service, Inc.
1011 4th Avenue
Watertown, SD 57201

9/26/03
Date

Brenda Morris for/
Judith McTernan

IF YOU WOULD LIKE COPIES OF THE ATTACHMENTS, PLEASE CONTACT THE REGIONAL HEARING CLERK.

THIS DOCUMENT WAS FILED IN THE RHC'S OFFICE ON SEPTEMBER 26, 2003.